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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0007**

State of Minnesota,
Respondent,

vs.

Gregg Michael Dickey,
Appellant.

**Filed October 16, 2017
Affirmed
Bjorkman, Judge**

Douglas County District Court
File No. 21-CR-15-1759

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Chad Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of felony fifth-degree assault, arguing that the district court plainly erred by accepting defense counsel's stipulation to appellant's prior

convictions when he did not personally waive his right to a jury trial on those elements of the felony offense. In a pro se supplemental brief, appellant challenges the credibility of a witness, asserts that the prosecuting authority lacked jurisdiction, and contends he was entitled to additional jail credit. We affirm.

FACTS

On August 2, 2015, appellant Gregg Dickey walked into a liquor store where N.L. was shopping. Dickey walked up to N.L., said something to him about a debt, and punched him in the jaw. Dickey was charged with felony fifth-degree assault, an elevated offense based on prior domestic violence-related offense convictions. *See* Minn. Stat. § 609.224, subd. 4(b) (2014). At Dickey’s jury trial, defense counsel stipulated that Dickey had a January 2015 felony stalking conviction and a September 2014 gross misdemeanor domestic-assault conviction. The district court accepted the stipulation and agreed that the prior-conviction elements would not be presented to the jury but did not question Dickey about his waiver of a jury determination as to those elements. The jury found Dickey guilty, and the district court, relying on the stipulation, convicted Dickey of felony fifth-degree assault. Dickey appeals.

DECISION

I. Dickey’s substantial rights were not impaired by the district court accepting his prior-convictions stipulation without a personal jury-trial waiver.

A defendant’s right to a jury trial includes “the right to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *State v. Kuhlmann*, 806 N.W.2d 844, 848 (Minn. 2011) (quotation omitted). A

defendant may waive that right and stipulate to an element or elements of the charged offense to keep potentially prejudicial information from the jury. *See id.* at 848-49 (citing *State v. Berkelman*, 355 N.W.2d 394 (Minn. 1984)). But such a waiver must be personally given. *Id.* at 848. When the district court fails to obtain a personal waiver and the defendant does not object to that omission, we review for plain error. *Id.* at 852.

To establish plain error, an appellant must demonstrate error, that was plain, and that affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We will only correct plain error if it “seriously affects the fairness and integrity of the judicial proceedings.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

Dickey argues that the district court’s acceptance of and reliance on the stipulation without his personal waiver of a jury trial on the prior-conviction elements was error, and plainly so under *Kuhlmann*. The state concedes that the district court committed plain error, and we agree. Accordingly, our principal inquiry is whether the error affected Dickey’s substantial rights.

An error affects substantial rights if “the error was prejudicial and affected the outcome of the case.” *Id.* (quotation omitted). In rejecting *Kuhlmann*’s argument that the district court’s failure to obtain his personal jury-trial waiver impaired his substantial rights, the supreme court noted that *Kuhlmann* benefited from the stipulation and the lack of a personal waiver did not affect the outcome of the case. *Kuhlmann*, 806 N.W.2d at 853. The same factors are present here. First, Dickey received the benefit of the stipulation to the prior-conviction elements because it kept potentially prejudicial evidence of Dickey’s prior assaultive conduct away from the jury. *See id.* Second, as in *Kuhlmann*,

there is no indication that the failure to obtain Dickey's personal jury-trial waiver affected the outcome of his case. Dickey does not challenge the existence of his prior convictions or the validity of his stipulations, or dispute that the state could have "readily proven the conviction-based elements." *See id.*

Dickey contends that the district court's error impaired his substantial rights because it resulted in him receiving a felony conviction and sentence, rather than "the misdemeanor authorized by the jury's verdict." This argument mistakes the reference point for our prejudice analysis. The district court could either have elicited a jury-trial waiver from Dickey before accepting the prior-convictions stipulation or, if he refused to waive that right, rejected the stipulation and permitted the state to present evidence of the prior convictions to the jury. Dickey identifies no basis for concluding that either scenario would have yielded a result other than the felony conviction he now challenges.

On this record, we conclude that the error in accepting Dickey's stipulation without his personal waiver of a jury determination on the prior-conviction elements did not impair his substantial rights.

II. Dickey's pro se arguments lack merit.

Dickey first urges this court to reverse his conviction because the victim is an unregistered sex offender and not a credible witness. But it is the role of the jury, not appellate courts, "to determine the credibility of the witnesses and weigh the evidence before it." *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). The jury had an opportunity to hear about N.L.'s criminal history and weigh its relevance to his credibility.

We defer to the jury's decision to believe N.L.'s testimony about the incident in question.
See id.

Second, Dickey contends that the Douglas County Attorney lacked "jurisdiction" to prosecute him because the incident occurred in the City of Alexandria, and the city attorney should have prosecuted the case. This argument is unavailing because the county attorney is statutorily required to prosecute felonies that occur within that county. Minn. Stat. § 388.051, subd. 1(3) (2016).

Finally, Dickey asserts that he is entitled to a "170 day jail credit." The district court sentenced Dickey to 24 months' imprisonment, with credit for 41 days served on the felony assault conviction. Dickey does not challenge this calculation. The district court then addressed Dickey's probation status with respect to his prior convictions, including a brief discussion of jail credit for the sentences being executed as a result of the current offense. Dickey appears to argue that he expected a 170-day jail credit for one of those sentences. This argument is misplaced. Jail credit for Dickey's earlier sentences is largely immaterial because these sentences are concurrent with the longer 24-month sentence. On this record, we discern no error by the district court in calculating Dickey's jail credit.

Affirmed.